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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 165

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF ON THE MERITS AND REPLY TO BRIEFS OF PETITIONERS AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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RESPONDENTS' BRIEF ON THE MERITS AND REPLY TO BRIEFS OF PETITIONERS AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

To the Honorable, the Supreme Court of the United States:

In this brief on the merits, respondents also reply to the briefs of petitioners and the Railway Labor Executives' Association as *amicus curiae.*

Preliminary Statement

As respondents understand the order of the Court entered October 12, 1959, granting the petition for writ of certiorari limited to Question No. 1 presented by the petition, the Court is interested in the broad question as to whether a District Court, in enjoining a strike growing out of a dispute over operating changes claimed to be in violation of labor agreements, which has been submitted to the National Railroad Adjustment Board, may require a railroad company, pending decision by the Adjustment Board, to restore the operations to what they were before the changes were made or to pay affected employees the sums of money which they would have received had such changes not been made.

With this understanding, respondents limit the first portions of their statement of the case and argument to matters germane to this broad issue; but, because of the wording of Question No. 1 and the nature of petitioners' argument, respondents are compelled, in the latter portions of their statement of the case and argument, to answer many charges of statutory and agreement violations (Petitioners' Brief, pages 4-6, 7, 22-24, 29, 31).

QUESTIONS PRESENTED

As stated in the order of the Court entered October 12, 1959, the petition for writ of certiorari was granted limited

to Question No. 1 presented by the petition, which reads as follows:

> "Whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted by a railroad to the National Railroad Adjustment Board and an injunction against a strike by employees is sought on authority of Brotherhood of Railroad Trainmen v. Chicago River and Ind. R. R. Co., 353 U. S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made."

This question contains and is predicated upon the following erroneous inferences, conclusions, and assumptions of fact:

(1) That respondents made "harmful changes in working conditions" in violation of their agreements and the Railway Labor Act;

(2) That such "harmful changes in working conditions" gave "rise to the dispute" which respondents submitted to the National Railroad Adjustment Board;

(3) That the District Court imposed "conditions" upon its grant of an injunction against a strike to protect the employees of respondents "against a harmful change in working conditions" during pendency of the dispute before the Adjustment Board; and

(4) That such "conditions", which ordered respondents to "restore the status quo, or, in the alternative, pay the employees the amount they would have been paid", were "reasonable".

Freed of such inferences, conclusions, and assumption of facts, this is the basic question before the Court:

May a District Court, in enjoining a strike growing out of a dispute over operating changes claimed to be in violation of labor agreements, which has been submitted to the National Railroad Adjustment Board, require a railroad company, pending decision by the Adjustment Board, to restore the operations to what they were before the changes were made or to pay affected employees the sums of money which they would have received had such changes not been made.

In addition, the following questions are also presented:

(a) Was the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which a preliminary injunction was issued against petitioners, an unlawful invasion by the District Court of the exclusive primary jurisdiction of the National Railroad Adjustment Board?

(b) Was the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which a preliminary injunction was issued against petitioners, contrary to and violative of the intent and purpose of the Railway Labor Act?

(c) Did the District Court, under its general equity powers, have authority to issue the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which a preliminary injunction was issued against petitioners?

(d) Was the action of the District Court in issuing the preliminary mandatory injunction against respondents or, in the alternative, the condition upon

which a preliminary injunction was issued against petitioners inequitable and an abuse of his equity powers?

(e) Did the District Court, after appeal by respondents, have power and authority to convert the preliminary mandatory injunction against respondents into a condition upon which the preliminary injunction was issued against petitioners?

(f) Did the District Court have power and authority to issue the preliminary mandatory injunction against respondents or, in the alternative, a condition upon which the preliminary injunction was issued against petitioners, when there were no pleadings or evidence to support such injunction or condition?

(g) Did the District Court have power and authority to issue the preliminary mandatory injunction against respondents or, in the alternative, a condition upon which the preliminary injunction was issued against petitioners, without requiring security as provided in Rule 65(c) of the Federal Rules of Civil Procedure?

(h) Did the District Court have power and authority to order respondents to restore and maintain the *status quo* which existed before respondents made operating changes and before the strike which made this litigation necessary?

(i) Did the District Court have power and authority to adjudicate the merits of this controversy on an application for a preliminary injunction?

STATEMENT OF THE CASE
(PART A)

For the reasons stated in the preliminary statement on page 2, respondents limit the first portion of this statement to facts germane to the basic questions in which we believe the Court is interested.

The Strike and Its Consequences

Without warning, respondents' engineers, firemen, conductors, brakemen and switchmen struck at 6:00 o'clock A. M. on November 6, 1958. This strike paralyzed all train operations of respondents over 2,919 miles of track extending from St. Louis and Kansas City to Oklahoma City, Houston, and San Antonio; it completely paralyzed all yard operations of respondents and all of their switching service to industries at and between those points; it stopped the rail transportation by respondents of United States mail; it stopped the transportation by respondents of passengers and freight in interstate commerce and in intrastate commerce; it stopped switching service by respondents to more than 3,600 industries which are served exclusively by them; it stopped switching service by respondents to more than 1,300 industries which are served by respondents and other railroads; it stopped switching service by respondents to hundreds of team tracks and freight stations serving thousands of industries; and it stopped the interchange of cars between respondents and many other railroad companies at hundreds of interchange points (R. 58-59, 79).[1]

The strike was stopped by a temporary restraining order issued on November 6, 1958 (R. 26-32, 69-70) on complaint filed by respondents on that date (R. 2-25).

If the strike had been resumed, the above described operations of respondents again would have been stopped;

[1]Affidavit of A. F. Winkel and exhibits (R. 58-90); Affidavit and testimony of A. F. Winkel offered (R. 269, 271, 299).

respondents would have been compelled to close more than 500 stations serving cities, towns and communities in the States of Missouri, Kansas, Oklahoma, and Texas; respondents would have been prevented from transporting more than 900 cars and 37,000 tons of freight daily; respondents would have been compelled to lay off approximately 2,100 employees,[2] with average daily earnings totaling $33,600.00, in addition to approximately 1,100 employees out on strike; and respondents would have been immediately deprived of revenues in excess of $160,000.00 per day which would have jeopardized the ability of respondents to meet their mortgage and equipment obligations approximating $10,000.00 per day (R. 59-60).

Approximately 83% of the gross revenues of respondents are derived from the transportation of United States mail, express, passengers and freight in interstate commerce to, from, and between the States of Missouri, Kansas, Oklahoma, and Texas, and between those States and practically every other State in the United States, and a resumption of said strike would have prevented respondents from transporting such interstate commerce as well as intrastate commerce within the States of Missouri, Kansas, Oklahoma, and Texas (R. 60).

[2]In contrast, 10 employees of respondents were affected by the operating changes which preceded the strike (R. 289).

Violations Alleged by Petitioners and Submission to National Railroad Adjustment Board

In answer to the complaint, petitioners admitted that they called the strike and alleged that respondents, in making operating changes,[3]—

> (1) Violated Articles 10, 11, 59 and 60 of the agreement effective November 1, 1929, as amended and revised, between respondents, The Brotherhood of Railroad Trainmen, and The Order of Railway Conductors and Brakemen;
>
> (2) Violated Article 6 of a National Agreement dated May 23, 1952, between The Order of Railway Conductors (now The Order of Railway Conductors and Brakemen) and representatives of numerous railroad companies, including respondents;
>
> (3) Violated Article 4 of a National Agreement dated May 23, 1952, between the Brotherhood of Locomotive Engineers and representatives of numerous railroad companies, including respondents;
>
> (4) Violated Article 4 of a National Agreement dated May 23, 1952, between The Brotherhood of Locomotive Firemen and Enginemen and representatives of numerous railroad companies, including respondents;
>
> (5) Violated Article VIII(b) of Mediation Agreement Case No. A-5464 dated July 18, 1957, between The Brotherhood of Locomotive Engineers and representatives of numerous railroad companies, including respondents;
>
> (6) Violated Article VIII(b) of Mediation Agreement Case No. A-5241 dated November 20, 1956, between The Brotherhood of Locomotive Firemen and

[3]Pursuant to respondents' General Orders Nos. 119 and 120 effective October 19, 1958 (R. 61, 62, 80, 81).

Enginemen and representatives of numerous railroad companies, including respondents;

(7) Violated Article VIII(b) of Mediation Agreement Case No. A-5248 dated April 5, 1957, between The Brotherhood of Railroad Trainmen and representatives of numerous railroad companies, including respondents;

(8) Violated Article V(b) of Mediation Agreement Case No. A-5294 dated June 12, 1957, between The Order of Railway Conductors and Brakemen and representatives of numerous railroad companies, including respondents; and

(9) Violated the provisions of the Railway Labor Act. (R. 2, 18-21, 37-40.)

Respondents submitted all of said claimed violations to the National Railroad Adjustment Board, First Division (R. 53, 75, 116, 117-118).[4]

[4](a) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (2) to the National Committee created by Article 6 of said National Agreement dated May 23, 1952, to which petitioner The Order of Railway Conductors and Brakemen was a party (R. 55, 76, 183, 184, 190-191).

(b) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (3) to the National Committee created by Article 4 of said National Agreement dated May 23, 1952, to which petitioner The Brotherhood of Locomotive Engineers was a party (R. 53-54, 75, 169, 170, 174).

(c) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (4) to the National Committee created by Article 4 of said National Agreement dated May 23, 1952, to which petitioner The Brotherhood of Locomotive Firemen and Enginemen was a party (R. 54-55, 75-76, 176, 177, 181).

(d) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (5) to the Disputes Committee created by Article X of said Mediation Agreement Case No. A-5464 dated July 18, 1957, to which petitioner The Brotherhood of Locomotive Engineers was a party (R. 56-57, 77, 205, 206-207, 209-210). The Disputes Committee has not acted.

(e) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (6) to the Disputes Committee created by Article X of said Mediation Agreement Case No. 5241 dated November 20, 1956, to which petitioner The Brotherhood of Locomotive Firemen and Enginemen was a party (R. 55-56, 76, 193, 194-195, 198). The Disputes Committee on September 22, 1959, held that "the issue involved in this dispute has been submitted to the Com-

(Continued on Page 10)

Preliminary Injunction

A preliminary injunction was issued on December 18, 1958, reading in part as follows:

> "It Is, Therefore, Ordered that this cause be continued and held in abeyance until the controversy be-

(Continued from Page 9)

mittee created by Article 11 of the Agreements of May 23, 1952", and the Committee, "in view of these circumstances", dismissed the case. A copy of the decision of the Committee is attached as Appendix A to this brief. The reason for the dismissal is unsound because no such issue has been submitted to any committee created by any article of any agreement of May 23, 1952, and no such committee would have had jurisdiction of such issue (R. 169, 170, 176, 177, 183, 184).

(f) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph (7) to the Disputes Committee created by Article X of said Mediation Agreement Case No. A-5248 dated April 5, 1957, to which petitioner The Brotherhood of Railroad Trainmen was a party (R. 56, 76-77, 199, 200, 203-204). The Disputes Committee dismissed the case for want of jurisdiction on September 22, 1959. A copy of the decision of the Committee is attached as Appendix B to this brief.

(g) Subject to jurisdictional objections, respondents also submitted the claimed violation described in preceding subparagraph number (8) to the Disputes Committee created by Article VII of said Mediation Agreement Case No. A-5294 dated June 12, 1957, to which petitioner The Order of Railway Conductors and Brakemen was a party (R. 57, 77, 211, 212, 215-216). The Disputes Committee dismissed the case for want of jurisdiction on August 4, 1959. A copy of the decision of the Committee is attached as Appendix C to this brief.

(h) Subject to jurisdictional objections, respondents also submitted the claimed violations described in preceding subparagraphs numbered (2), (3) and (4) to the National Mediation Board (R. 45, 77-78, 226-228, 234-238).

(i) Subject to jurisdictional objections, respondents also submitted the claimed violations described in preceding subparagraphs numbered (5), (6), (7) and (8) to the National Mediation Board (R. 44-45, 77, 217-219, 222-225).

(j) In two letters dated January 30, 1959, the National Mediation Board advised respondents as follows:

> "Your application was considered by the Board in executive session on January 26, 1959. In view of the fact that the carriers named have submitted this dispute both to the First Division of the National Railroad Adjustment Board and the Disputes Committee created by the articles of the national agreements mentioned above, the Board directed that your application for an interpretation of the national agreements in question be declined on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned."

Copies of these letters are attached as Appendix D and Appendix E to this brief.

tween plaintiffs and defendants herein shall have been settled by and between the parties, or until decisions on the various submissions made by plaintiffs, as set out in the complaint, as amended,[5] have been rendered, and that during such period plaintiffs restore the conditions which were affected by their General Orders 119 and 120, referred to in the complaint, as amended,[6] to the conditions which existed before such orders became effective, and maintain such restored conditions during such period. In the alternative if the plaintiffs do not elect to restore and maintain the conditions as ordered aforesaid, then until the matters have been finally determined in the boards hereinabove mentioned, the plaintiffs will pay to the employees of the plaintiffs affected adversely by plaintiffs' General Orders 119 and 120 the same amounts of money that they would have paid had the changes made by plaintiffs' General Orders 119 and 120 not been made.

"* * * It is further ordered that the defendants and employees of plaintiffs represented by defendants be and they are hereby enjoined from striking during such period on account of the controversy and dispute involved herein between plaintiffs and defendants." (R. 91.)

In denying respondents' motion for a stay order on January 13, 1959 (R. 101), after respondents had appealed on December 29, 1958 (R. 92-93), the District Court attempted to convert the preliminary mandatory injunction against respondents into a condition upon which the preliminary injunction had been issued against petitioners (R. 102-104).

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[5] R. 53-57, 116, 117-118, 169, 170, 174, 176, 177, 181, 183, 184, 190-191, 193, 194-195, 198, 199, 200, 203-204, 205, 206-207, 209-210, 211, 212, 215-216, 217-219, 222, 225, 226-228, 234-238.

[6] R. 47-50.

STATEMENT OF THE CASE

(PART B)

For the reasons stated in the preliminary statement on page 2, respondents now set forth statements of fact germane to petitioners' charges of statutory and agreement violations (Petitioners' Brief, pages 4-6, 7, 22-24, 29, 31).[7]

Rearrangement of Service

The lines of railroad involved in this litigation are shown in red on the maps made a part of the record (R. 79, 359). The portion thereof between Wichita Falls, Texas (North Yard), and Forgan, Oklahoma, over which this controversy arose, is emphasized by paralleling green lines. This line, 302 miles in length, is the Western Subdivision of the Southern Division of respondents' lines of railroad (R. 60).

This 302-mile line now constitutes and always has constituted a separate seniority district for respondents' engineers, firemen, conductors and brakemen, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority (R. 60-61).

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[7]Also, facts with respect to proceedings before the National Mediation Board.

Prior to October 19, 1958, way freight crews on this line were assigned as follows:

> Two crews between North Yard (Wichita Falls, Texas) and Welon (Altus, Oklahoma), a distance of 75.9 miles, daily except Sunday, with North Yard the home terminal for both crews, and with Sunday layover at North Yard for one crew and at Welon for the other crew;
>
> One crew from Welon (Altus, Oklahoma) to Elk City, Oklahoma, and return, a distance of 58.3 miles in each direction, daily except Saturday, with Welon the home terminal and with Saturday layover at Welon;
>
> One crew from Elk City, Oklahoma, to Guest (Woodward, Oklahoma), a distance of 84.8 miles, on Mondays, Wednesdays and Fridays, and from Guest to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City; and
>
> One crew from Guest (Woodward, Oklahoma) to Forgan, Oklahoma, a distance of 83.2 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Guest on Tuesdays, Thursdays and Saturdays, with Guest the home terminal and with Sunday layover at Guest.

Such way freight assignments, or similar way freight assignments between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, have been in existence for more than twenty-five years (R. 61).

Effective 12:01 A. M. on October 19, 1958, respondents rearranged assigned way freight service between North

Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

> Assigned two wayfreight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other; and
>
> Assigned one wayfreight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City.

This rearrangement of way freight service was made in accordance with General Order No. 119 of respondents dated October 2, 1958 (R. 61-62, 80).

Prior to October 19, 1958, North Yard (Wichita Falls, Texas) was the home terminal and Altus, Oklahoma, Woodward, Oklahoma, and Forgan, Oklahoma, were the bulletined away-from-home terminals for unassigned crews in through freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma. Effective at 12:01 A. M. on October 19, 1958, respondents abolished Altus, Oklahoma, and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service, established Elk City, Oklahoma, as an away-from-home terminal for such crews, leaving North Yard (Wichita Falls, Texas) as the home terminal and Forgan, Oklahoma, as an away-from-home terminal for such crews. This

change in away-from-home terminals was made in accordance with General Order No. 120 of respondents dated October 2, 1958 (R. 62, 81).

North Yard (Wichita Falls, Texas) now is and always has been the home terminal for unassigned crews in through freight service between North Yard and Forgan, Oklahoma, and North Yard (Wichita Falls, Texas) now is and always has been the only point where an extra board has been maintained for way freight crews and unassigned through freight crews operating between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma (R. 62).

Assigned way freight crews now handle, and they always have handled, all of the traffic between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, except, during the grain seasons in May and June of each year, unassigned crews in through freight service are called as needed to handle the overflow wheat which cannot be handled by way freight crews, and, when so called, unassigned through freight crews operate over all or any portion of the line without changing crews except in rare instances where an available crew is used out of an away-from-home terminal under the first-in first-out rule (R. 63).

This line has been recently dieselized. Prior thereto all traffic was handled by steam locomotives which were capable of only short runs, making it necessary to have more terminals. This resulted in considerable terminal delays to through traffic because the requirements of local service made it impossible to arrange through connecting sched-

ules. These delays resulted in the loss of traffic, principally through diversion to trucks. To overcome such losses, it was necessary to expedite the movement of traffic by extending runs and reducing the number of terminals, thereby eliminating all unnecessary terminal delays. This was made possible through the use of diesel power. These were the changes made effective on October 19, 1958 (R. 63).

Agreement Provisions

There is no provision in any agreement between respondents and petitioners, or any of them, which prohibited respondents from making such changes. On the contrary, such changes were authorized by the following provisions of agreements between respondents and petitioners, viz:

Agreement with
The Brotherhood of Locomotive Engineers
(Effective October 1, 1918)

"Article 34"

"The rights to regular engines, also the right and preference to regular runs will be governed by seniority in service on the respective districts to which engineers may be assigned.

"No freight run or yard engine of less than six days per week will be considered for regular assignment and engineers on all such assignments will be paid for all work days not used. *Five days' notice will be given before* road service of this kind is inaugurated or *terminal is changed.* It is understood that fixture switch engineers hold seniority only in yard service." (Our italics.) (R. 63-64.)

"Article 35"

"Should service be reduced, preference of runs will be governed by seniority on the respective district; when any run is created or vacant on district, the senior engineer on such district will have the right to such run. Should he decline to accept it, or fail to ask for it within ten days, after such vacancy occurs, he will forfeit his right to such run until it again becomes vacant, and it will be open to each engineer who is younger in service in accordance with above provisions.

"*A run will be vacant when terminal is changed to the extent of two miles or more* or when vacated by the engineer holding it, or when the regular time or mileage is changed as much as four hours." (Our italics.) (R. 64.)

"Article 11"

"Held Away-From-Home Terminal"
(As amended by National Agreement dated August 11, 1948—page 15)

"(a) Engineers in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should an engineer be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal, except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, the *railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics.) (R. 64-65.)

Agreement with

The Brotherhood of Locomotive Firemen and Enginemen (Effective October 1, 1918, with revisions to November 1, 1957)

"Article 40"

"(a) When any run is created or vacant on a district, the senior fireman on such District will have the right to such run. Should he fail to make application or bid for such run within five days after such vacancy is posted, except in the case of sickness or absence, he will forfeit his right to such run until it again becomes vacant, and it will be opened to each fireman who is younger in service in accordance with the above provisions, provided, that when a fireman exercises the privilege of taking a run created or made vacant during his sickness or absence, the run will not otherwise be reopened.

"(b) *A run will be considered vacant when terminal is changed to the extent of two or more miles*, or when vacated by the fireman holding it, or when the time or mileage is changed to the extent of 10 per cent, or when the lay over is changed as much as four hours. This last provision not to apply to yard engines." (Our italics.) (R. 65-66.)

"Article 11"

"Held Away From Home Terminal"

"(a) (National Agreement, August 11, 1948) Firemen, and helpers on other than steam power, in pool

freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should firemen, or helper on other than steam power, be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, *the railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics.) (R. 66.)

Agreement with

The Brotherhood of Railroad Trainmen and
The Order of Railway Conductors and Brakemen
(Effective November 1, 1929, with
revisions to April 1, 1954)

"Article 10"

"Wayfreight and Mixed Train Service"
"Rates of pay effective December 16, 1953"

* * * * *

"(f) No changes will be made in the above runs (between Wichita Falls and Forgan), nor number of crews assigned to them, unless business or changed conditions justify it, nor will terminals be changed, or runs rearranged, without ten (10) days' notice * * *." (R. 67.)

"Article 45"

* * * * *

"(e) Seniority will govern the preference of assignment in service, provided that senior trainmen declining closed runs will forfeit their rights to same until vacancies occur, except in reducing the force, the youngest man will be reduced from the service.

* * * * *

"(g) Trainmen holding closed runs who are displaced by their seniors or whose runs have been abolished, will have the right within ten (10) days to displace any junior man.

* * * * *

"(i) The following shall be known as closed runs: *Wayfreight and mixed runs*, assigned work trains, pilots assigned to helper engines, also passenger runs that are located away from division terminals, regular runs on the G. H. & H. and any other runs located away from a district terminal, and *shall be advertised for a period of ten (10) days.*" (Our italics.) (R. 67.)

* * * * *

Freight Service Rulings

(Appendix to Agreements with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen.)

* * * * *

"(h) When closed runs are thrown open for advertisement due to changed conditions etc., the regular

conductor and brakeman holding such run at that time will be permitted to hold run during advertisement.

"(i) It is agreed that when a terminal is changed for a closed run or a run changed from day to night, such run will be advertised." (R. 68.)

"Article 34"

"Conductors and Trainmen in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at a rate per hour of 1/8th of the daily rate paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour perior thereafter.

"Should a Conductor or Trainman be called for service or ordered to deadhead after pay begins, held away from home terminal time shall cease at the time pay begins for such service or deadheading.

"Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"For the purpose of applying this rule *the railroad will* designate a home terminal for each crew in pool freight and in unassigned service." (Our italics.) (R. 68).

On October 7, 1958, petitioners requested respondents to cancel said General Order No. 119 and said General Order No. 120 and on the same date respondents denied such request (R. 68-69).

Proceedings Before National Mediation Board

On October 14, 1958, the National Mediation Board advised respondents that petitioners had requested the services of the Board "in dispute with MKT Railroad over abolishing established terminals and *changing* intra-divisional *service* contrary to provisions of Article 4 of BLE, BLF&E, and ORC&B May 23, 1952 and Article 6 May 25, 1951 National Agreements" (Our italics) (R. 69). Said alleged agreements are more fully described in paragraphs IX and XII of the complaint, as amended (R. 18-21, 53-57), and copies of said alleged agreements with The Order of Railway Conductors, The Brotherhood of Locomotive Engineers, and The Brotherhood of Locomotive Firemen and Enginemen are attached as Exhibits 9, 10, and 11 to respondents' submission to the First Division of the National Railroad Adjustment Board (R. 53, 148-152).

As above shown, in seeking the services of the National Mediation Board, petitioners charged respondents with violating agreements with four organizations, namely, The Brotherhood of Railroad Trainmen, The Order of Railway Conductors and Brakemen (formerly The Order of Railway Conductors), The Brotherhood of Locomotive Engineers, and The Brotherhood of Locomotive Firemen and Enginemen. However, in their verified answer, petitioners admitted that there is no such agreement with The Brotherhood of Railroad Trainmen (R. 19, 38). And petitioners now rely only on such agreements with The Brotherhood of

Locomotive Engineers and The Brotherhood of Locomotive Firemen and Enginemen, thereby in effect admitting that there is no such agreement with The Brotherhood of Railroad Trainmen or The Order of Railway Conductors and Brakemen (Petitioners' Brief, pages 4-6).

On October 20, 1958, the Executive Secretary of the National Mediation Board advised respondents and petitioners that said application of petitioners for the services of the Board had been given the Board's file C-2827 and that one of the Board's mediators then in Dallas, Texas, would commence an investigation on October 21, 1958, and that the Board "suggests carrier defer contemplated changes pending such immediate investigation". At that time, said changes had already been made pursuant to and in accordance with respondents' said General Orders Nos. 119 and 120 which became effective at 12:01 A.M. on October 19, 1958 (R. 69.)

On November 5, 1958, after investigation by said mediator, the National Mediation Board advised respondents and petitioners as follows:

> "Re file C-2827 Missouri-Kansas-Texas Railroad and BLE, BLF&E, ORC&B and BRT concerning carrier's action in abolishing terminal and *changing various runs*. On basis of mediator's investigation and in view of fact this dispute appears identical with that covered by our case E-56 handled in 1956, National Mediation Board is of opinion that the dispute is not one subject to docketing and mediation under the Act. All concerned are therefore notified that file C-2827 is being closed as of this date." (Our italics.)

Without notice to respondents, a strike of their engineers, firemen, conductors, brakemen, and switchmen was called by petitioners and became effective at 6:00 o'clock A.M. on November 6, 1958, but was stopped by a temporary restraining order followed by a preliminary injunction (R. 69-70, 26-32, 90-92).

Case E-56, to which the Board referred, originated on August 27, 1956, in a strike called for 12:01 A.M. on September 1, 1956, by The Brotherhood of Railroad Trainmen, The Brotherhood of Locomotive Firemen and Enginemen, and The Order of Railway Conductors and Brakemen. At the request of the Board, and during mediation proceedings, said Brotherhoods and Order agreed to withdraw said strike date and respondents agreed to maintain the *status quo*. On October 22, 1956, after unsuccessful mediation efforts, the National Mediation Board closed its file in Case E-56 (R. 70).

Said Case E-56 involved the same controversy as that involved in file C-2394 of the National Mediation Board which was commenced on August 11, 1955, when The Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Firemen and Enginemen, The Brotherhood of Railroad Trainmen, and The Order of Railway Conductors and Brakemen, requested the Board to take jurisdiction. At the request of the Board, respondents deferred the proposed changes. On February 10, 1956, after investigation

by a mediator, the National Mediation Board by telegram advised respondents and said Brotherhoods and Order, with respect to the dispute involved in the Board's file C-2394, as follows:

> "Investigation of this file indicates that carrier has complied with Article 10(f) in Conductors and Brakemen's agreement and Article 34 of Engineers agreement by serving notice required under those articles of change in assignment. Investigation further indicates that no formal notices have been served by either party on the other for change in agreement on this subject. Section 2 Seventh and Section 6 of RLA (Railway Labor Act) apply only in situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements. In absence of such notices this Board fails to find any basis for docketing application for mediation filed by the four organizations."

And, in response to an inquiry from the President of The Brotherhood of Locomotive Firemen and Enginemen with respect to said advice of February 10, 1956, the National Mediation Board by letter dated February 29, 1956, advised the President of said Brotherhood as follows:

> "You state that some question has arisen regarding the authority of this Board to determine whether or not the carrier 'has complied with Article 10(f) of the Conductors' and Brakemen's Agreement and Article 34 of the Engineers' Agreement by serving notice required under those Articles of change in assignment.'
>
> "Our telegram of February 10, 1956 stated only that the Mediator's investigation of this file indicates that the carrier had complied with those articles by the serving of required notices. The question of proper interpretation or application of those articles to the controversy was not touched upon.

> "The National Mediation Board has no power under the Railway Labor Act to interpret the provisions of working agreements nor make any determination regarding compliance or non-compliance with such agreements in any particular situation. Such determinations can, of course, be made only by the National Railway Adjustment Board.
>
> "Our telegram was intended to direct attention to the fact that in the absence of notices served by either party on the other for changes in rates, rules or working conditions, no basis exists under Section 2, Seventh, or Section 6 of the Railway Labor Act on which the application filed by the three organizations could be docketed. Any questions involving the proper interpretation or application of agreement rules would come under the jurisdiction of the National Railway Adjustment Board."

Neither respondents nor petitioners, or any of them, have served any notice on the other of any intended change in any agreement affecting rates of pay, rules or working conditions (R. 70-72).

SUMMARY OF ARGUMENT

On petitioners' orders, and without warning, respondents' engineers, firemen, conductors, brakemen and switchmen struck at 6:00 o'clock A. M. on November 6, 1958. This strike paralyzed all train and yard operations of respondents over 2,919 miles of track extending from St. Louis and Kansas City to Oklahoma City, Houston, and San Antonio (R. 58-59).

The strike was stopped by a temporary restraining order issued on November 6, 1958 (R. 26-32, 69-70) on respondents' complaint filed on that date (R. 2-25).

In answer to the complaint, petitioners admitted that they called the strike and alleged that respondents, in making certain operating changes, violated specific agreements and provisions of the Railway Labor Act (R. 37-40). Respondents submitted these claimed violations to the National Railroad Adjustment Board, First Division (R. 53, 75, 116, 117-118) and, subject to jurisdictional objections, in part to the National Mediation Board and to various Disputes Committees and National Committees (Footnote 4, pages 9-10).

A preliminary injunction was issued on December 18, 1958, enjoining a strike pending decisions by the Adjustment Board and the other Boards and Committees; and, pending such decisions, ordering respondents either to restore the *status quo* or pay to affected employees the amounts they would have received had such changes not been made (R. 90-91).

The mandatory order of December 18, 1958, directed to respondents, was void for each and all of the following reasons:

(1) It was an unlawful invasion of the exclusive primary jurisdiction of the National Railroad Adjustment Board;

(2) It was contrary to and violative of the intent and purpose of the Railway Labor Act; and

(3) It was inequitable and an abuse of the equity powers of the Court.

The mandatory order of December 18, 1958, directed to respondents, also was void for each and all of the following additional reasons:

(a) It was not supported by any pleadings or evidence;

(b) It was issued without requiring security as provided in Rule 65(c) of the Federal Rules of Civil Procedure;

(c) It unlawfully restored the *status quo* which existed before respondents made the operating changes and before the strike which made this litigation necessary; and

(d) It was an unlawful adjudication of the merits of the controversy upon an application for a preliminary injunction.

After appeal by respondents on December 29, 1958 (R. 92-93), the District Court lacked power and authority on January 13, 1959, in denying respondents' motion for a stay order (R. 101), to convert the preliminary mandatory injunction against respondents into a condition upon which the preliminary injunction was issued against petitioners.

Respondents have not violated any agreement with petitioners or any provision of the Railway Labor Act.

ARGUMENT

(Part A)

For the reasons stated in the preliminary statement on page 2, respondents limit the first portion of this argument to the basic questions in which we believe the Court is interested.

As stated in Part A of the Statement of the Case, respondents' engineers, firemen, conductors, brakemen and switchmen struck at 6:00 o'clock A. M. on November 6, 1958, with the consequences therein stated. The strike was stopped by a temporary restraining order issued on November 6, 1958 (R. 26-32, 69-70), on complaint filed by respondents on that date (R. 2-25).

Also, as shown in Part A of the Statement of the Case, petitioners, in their answer to the complaint, admitted that they called the strike and alleged that respondents, in making certain operating changes, violated various agreements between petitioners and respondents (R. 2, 18-21, 37-40, 61, 62, 80, 81). Respondents submitted all of said claimed violations to the National Railroad Adjustment Board, First Division (R. 53, 75, 116, 117-118).[8]

A preliminary injunction was issued on December 18, 1958, reading in part as follows:

> "It Is, Therefore, Ordered that this cause be continued and held in abeyance until the controversy between plaintiffs and defendants herein shall have been settled by and between the parties, or until de-

[8]Subject to jurisdictional objections, respondents also made other submissions to various National Committees, Disputes Committees, and the National Mediation Board (R. 53-57, 116, 117-118, 169, 170, 174, 176, 177, 181, 183, 184, 190-191, 193, 194-195, 198, 199, 200, 203-204, 205, 206-207, 209-210, 211, 212, 215-216, 217-219, 222, 225, 226-228, 234-238).

cisions on the various submissions made by plaintiffs, as set out in the complaint, as amended,[9] have been rendered, and that during such period plaintiffs restore the conditions which were affected by their General Orders 119 and 120, referred to in the complaint, as amended,[10] to the conditions which existed before such orders became effective, and maintain such restored conditions during such period. In the alternative if the plaintiffs do not elect to restore and maintain the conditions as ordered aforesaid, then until the matters have been finally determined in the boards hereinabove mentioned, the plaintiffs will pay to the employees of the plaintiffs affected adversely by plaintiffs' General Orders 119 and 120 the same amounts of money that they would have paid had the changes made by plaintiffs' General Orders 119 and 120 not been made.

"* * * It is further ordered that the defendants and employees of plaintiffs represented by defendants be and they are hereby enjoined from striking during such period on account of the controversy and dispute involved herein between plaintiffs and defendants." (R. 91.)

In denying respondents' motion for a stay order on January 13, 1959 (R. 101), after respondents had appealed on December 29, 1958 (R. 92-93), the District Court attempted to convert the preliminary mandatory injunction against respondents into a condition upon which the preliminary injunction had been issued against petitioners (R. 102-104).

[9]R. 53-57, 116, 117-118, 169, 170, 174, 176, 177, 181, 183, 184, 190-191, 193, 194-195, 198, 199, 200, 203-204, 205, 206-207, 209-210, 211, 212, 215-216, 217-219, 222, 225, 226-228, 234-238.

[10]R. 47-50.

Point 1

The public has an interest in this controversy

Authorities

Virginian Railway Company v. System Federation No. 40, et al., 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

In the forefront of this argument, we deem it advisable to emphasize the public interest in this controversy. As cogently stated by this Court in *Virginian Railway Company v. System Federation No. 40, et al., 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592:*

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern" *(U. S. page 552, L. Ed. page 802).*[11]

Other decisions of this Court are to the same effect.

Point 2

Whether operating changes should be made is a decision for railroad management in the absence of prohibitory agreements

Authorities

New York Central Railroad Company v. Brotherhood of Railroad Trainmen, et al., 140 F. Supp. 273,

[11]The operating changes of which petitioners complain made it possible for respondents to eliminate all unnecessary terminal delays and to expedite the movement of traffic (R. 63).

affirmed 246 F. 2d 114, certiorari denied, 355 U. S. 877, 2 L. Ed. 2d 107, 78 S. Ct. 140.

Managing officers of a railroad corporation have a responsibility both to their company and to the public and, in the absence of prohibitory agreements, it is for them to say whether operating changes should be made. *New York Central Railroad Company v. Brotherhood of Railroad Trainmen, et al., 140 F. Supp. 273, affirmed 246 F. 2d 114, certiorari denied, 355 U. S. 877, 2 L. Ed. 2d 107, 78 S. Ct. 140.* In that case, the District Court stated that the proposed closing of a yard "is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such step advisable", and that Court also said:

> "We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its round houses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system" (pages 279-280).

Point 3

The preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, was an unlawful invasion by the District Court of the exclusive primary jurisdition of the National Railroad Adjustment Board

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823;

Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky, et al., 290 U. S. 264, 78 L. Ed. 307;

Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415;

Magniac, et al. v. Thomson, 56 U. S. (15 Howard) 281, 14 L. Ed. 696;

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.

The District Court, by order dated December 18, 1958, granted respondents' application for a preliminary injunc-

tion and enjoined a strike by respondents' engineers, firemen, conductors, brakemen, and switchmen, pending decision by the National Railroad Adjustment Board, on submission by respondents, as to whether respondents violated any agreements with petitioners when respondents on October 19, 1958, made certain changes in their assigned way freight service and in their away-from-home terminals for unassigned through freight service between Wichita Falls, Texas, and Forgan, Oklahoma (R. 90-91).

The preliminary injunction was issued primarily to protect the jurisdiction of the National Railroad Adjustment Board as authorized by the decision of this Court in *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823.* In that case, the Court stated that "the ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board" *(U. S. page 31, L. Ed. page 624)*, and, after discussing the nature and purpose of that Board, and holding its awards to be "final and binding upon the parties", the Court upheld the power of the Federal Courts to enjoin a union "from striking to defeat the jurisdiction of the Adjustment Board" *(U. S. pages 39, 42; L. Ed. pages 628, 630)*.

This prohibition, against a strike to defeat the jurisdiction of the National Railroad Adjustment Board, is further evidence of this Court's determination to give that Board

"the first opportunity to pass on the issue" *(326 U. S. 567, 90 L. Ed. 323)* and to prevent the invasion by any court of "the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(330 U. S. 244, 94 L. Ed. 800)*. This policy of the law has been firmly established by decisions of this Court. In *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322*, a union sought relief in the courts. Recognizing the difficulties inherent in railway labor disputes, and denying injunctive power of courts with respect to the merits of such disputes until the Adjustment Board acts, this Court said:

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. (Citing cases.) Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand" *(U. S. page 567, L. Ed. page 323)*.

This decision was reaffirmed in *Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577*, wherein this Court said:

> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since

the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the (May 20,) 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. 44 Stat. 577, 578, ch. 347. But this voluntary machinery proved unsatisfactory, and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a National Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193, ch. 691. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.

"The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of R. Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322, supra. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents * * *.' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent

> in this field. 326 U. S. at 567, 568. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(U. S., pages 242-244, L. Ed., pages 799-800).*

Contrary to these decisions, the District Court did not give the National Railroad Adjustment Board "the first opportunity to pass on the issue" and it unlawfully invaded the jurisdiction of the National Railroad Adjustment Board to which respondents have submitted petitioners' claims of agreement violations (R. 90-92, 60-63, 72-75, 116-168). Although enjoining a strike pending decision by the National Railroad Adjustment Board[12] as to whether respondents violated any agreements with petitioners, the District Court, by the same order, issued a preliminary mandatory injunction against respondents or, in the alternative, a condition upon which the preliminary injunction was issued against petitioners, commanding respondents, pending such decision by the National Railroad Adjustment Board, and decisions by other Boards and Committees, either to restore the operations to what they were before changes were made or to pay to employees adversely affected by such changes the same amount of money which such employees would have received had such changes not been made (R. 90-92). The jurisdiction of the National Railroad Adjustment Board to determine whether respondents will be in violation of any agreement with petitioners pending

[12]Also, pending decisions of the National Mediation Board, and Committees to which some of petitioners' claims have been submitted, subject to jurisdictional objections (R. 90-92, 75-78, 169, 174, 176, 181, 183, 190-191, 193-194, 198, 199, 203-204, 205, 209-210, 211, 215-216, 217-218, 222-225, 226-227, 234-238).

decision by that Board and, if time claims are timely filed, what amount of money, if any, should be paid by respondents to their employees pending decision by that Board, was thus unlawfully invaded and effectively destroyed.

Such prohibited invasion cannot be justified "under the guise of discretionary equity powers to impose reasonable conditions upon the grant of an injunction" (Opinion of Court of Appeals, R. 376, *266 F. 2d 335, 341*). The opinion of this Court in *Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky, et al., 290 U. S. 264, 78 L. Ed. 307*,[13] is analogous. In that case, the Court recognizing there are "some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief" *(U. S. page 271, L. Ed. page 313)*, reversed the decision of a three-judge District Court which refused to enjoin a confiscatory 45-cent rate because the Gas Company would not comply with the condition prescribed by the Court that the Gas Company "file with the court its consent that the fund impounded from the rate

[13]Cited in Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415, upon which petitioners rely (Petitioners' Brief, page 14; Brief of Railway Labor Executives' Association, page 7). In that case, an attack was made upon a report and order of the Interstate Commerce Commission relating to allowances for the spotting of cars. The interlocutory injunction temporarily stayed enforcement of the report and order but, as stated in the opinion:

> "* * * the interlocutory injunction also provided 'that until the further order of the Court, any and all sums due and payable to plaintiff [appellant], under the * * * tariff providing said allowance, shall be set up by defendant Indiana Harbor Belt Railroad Company on its books of account, which sums so set up shall be paid over to * * * [appellant], or canceled, only upon the further order of this Court, [appellant] * * * by its counsel having agreed in open court to such arrangement, without prejudice'." (U. S. page 155; L. Ed. pages 559-560.)

That case is not in point because counsel agreed to imposition of the condition and the District Court protected all parties by providing that the accumulated allowances should be subject to the further order of the Court.

collected in excess of 50 cents per thousand (found to be reasonable) be distributed to such of its patrons as were entitled to share in it" *(U. S. pages 266, 268-269, L. Ed. pages 310, 311)*. In that case, judicial power to prescribe the rate had not been conferred by the Constitution *(U. S. pages 271-272, L. Ed. page 313)*. In this case, judicial power to issue the injunction or prescribe the condition does not exist because either is an unlawful invasion of the exclusive primary jurisdiction of the National Railroad Adjustment Board, *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.* Those cases define and establish the rights of the parties which a court of equity "has no power to change or unsettle", and it is the duty of those courts, in such cases, to "follow the law", *Magniac, et al. v. Thomson, 56 U. S. (15 Howard) 281, 299, 14 L. Ed. 696, 703-704.*

Point 4

The preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, is contrary to and violative of the intent and purpose of the Railway Labor Act

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635;

Railway Labor Act:

Section 2 Seventh (45 U. S. C. A. Section 152 Seventh),

Section 3 (45 U. S. C. A. Section 153),

Section 3 First (i) [*45 U. S. C. A. Section 153 First (i)*],

Section 6 (45 U.S.C.A. Section 156).

Respondents submitted petitioners' claimed agreement violations to the National Railroad Adjustment Board, First Division (R. 53, 116, 117-118). This was authorized by Section 3 First (i) of the Railway Labor Act which provides that either party may refer to the appropriate division of the Adjustment Board disputes between employees and a carrier "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" [*45 U. S. C. A. Sec. 153 First (i)*]. As stated by this Court, "either side may submit the dispute to the Board", *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 34, 1 L. Ed. 2d 622, 625.* In that case, which involved claims under a collective bargaining agreement, the Court stated that "the grievances for which redress is sought by the Brotherhood are admittedly 'minor disputes' as that phrase is known in the parlance of the Railway Labor Act" and that "these are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation" *(U. S. pages 32, 33, L. Ed. 2d pages 624, 625).* In reaching this conclusion, the Court

quoted from testimony given by George M. Harrison, Chairman of the Legislative Committee of the Railway Labor Executives' Association,[14] and chief spokesman for the railway labor organizations, at the hearing on S. 3266 before the Senate Committee on Interstate Commerce and at the hearing on H. R. 7650 before the House of Representatives Committee on Interstate and Foreign Commerce, Seventy-third Congress, Second Session *(U. S. pages 38-39, L. Ed. 2d pages 627-628)*. In such testimony, Mr. Harrison explained the difference between "major" and "minor" disputes and described the character of disputes which would be handled by the National Mediation Board and the character of disputes which would be handled by the National Railroad Adjustment Board. Testifying with respect to S. 3266, Mr. Harrison said:

> "* * * Grievances are instituted against railroad officers' actions * * *."[15]
>
> "THE CHAIRMAN. Now will you explain—I suppose I ought to know this, but I don't—just what kind of controversy is to be settled by these boards, and what kind by the boards of mediation. I haven't got it clearly in my mind.
>
> "MR. HARRISON. I will be glad to. Being so familiar with the law, I probably didn't go into that as thoroughly as I ought to. There are two classes of controversies that develop. One is what we call major

[14] "This Association comprised the twenty-one standard railway groups", 353 U. S. 38, 1 L. Ed. 2d 627, including petitioners. Hearings on S. 3266 before the Senate Committee on Interstate Commerce, Seventy-third Congress, Second Session.

[15] Quoted by the Court in the Chicago River case, 353 U. S. 38, 1 L. Ed. 2d 628.

changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.

"THE CHAIRMAN. On all the railroad systems in the country?

"MR. HARRISON. That is right. Now, that is handled in this fashion: You have a conference with the officers of the railroad and endeavor to agree. If you are unable to agree then, either party has the privilege of invoking the aid and service of the United States Board of Mediation. The Board of—

"THE CHAIRMAN. (interposing) Will have under the law?

"MR. HARRISON. Yes; there is no change in that. Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that the rule of the contract should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules." (Pages 33-34.)

And, testifying with respect to H. R. 7650, Mr. Harrison said:

"The next general question covered by the act is that of establishing machinery to settle controversies that grow up between management and employees over the meaning or the allocation of the contracts that

> have previously been made. Now, as a brief explanation of the character of those disputes, they might very well concern a man's seniority, whether or no his date is the proper date; might very well concern whether or no he has been paid the proper amount of compensation for a particular class of work performed, as the contract provides should be paid. It may very well concern the separation of an employee from the service, whether or no he has been unjustly dismissed. It very well may concern the promotion of a man, whether he should have been accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or no he was laid off in his seniority order; if he had not been taken back in his seniority order.
>
> "That is the class of disputes that this adjustment machinery proposed in this act will take care of." (Page 80.)

From the foregoing it is obvious that "minor" disputes, such as here involved, growing out of "the interpretation or application of agreements concerning rates of pay, rules, or working conditions", arise *after* such interpretation or application has been made by a carrier and that such disputes are progressed to the Adjustment Board under Section 3 of the Act (45 U. S. C. A. Section 153) which contains no reference to or provision for maintaining or restoring the *status quo* pending decision by the Board. It is equally obvious that the dispute here involved does not come within the purview of Section 2 Seventh (45 U. S. C. A. Section 152 Seventh) which prohibits a carrier from changing rates of pay, rules, or working conditions of its

employees, *"as a class, as embodied in agreements"*[16] (our italics), except in the manner prescribed in such agreements or in Section 6 (45 U. S. C. A. Section 156), and that the dispute here involved does not come within the purview of Section 6 which requires carriers and representatives of employees to give at least thirty days' written notice of an "intended change *in agreements*[17] affecting rates of pay, rules, or working conditions". No such change or intended change is involved in this dispute and no such notice was

[16] [17]The italicized words were added to Section 2 Seventh and Section 6, respectively, in the 1934 amendments to the Railway Labor Act, after approval by Joseph B. Eastman, Federal Coordinator of Transportation, who, as stated by this Court, was the "principal draftsman of the 1934 bill", 353 U. S. 37, 1 L. Ed. 2d 627. In testifying at the hearing on S. 3266 before the Senate Committee on Interstate Commerce, Seventy-third Congress, Second Session, Mr. Eastman, speaking of Section 2 Seventh, said:

> "This paragraph, on page 7, relates to the changing of rates of pay, rules, or working conditions. The railroads propose to amend it by adding after the word 'employees' in line 14 the words 'as a class as embodied in agreements' and to make corresponding changes in the language which follows. The amendment is an improvement, and should be made." (Hearings, page 151.)

And, in testifying with reference to Section 6, Mr. Eastman said:

> "In line 13 of page 29, the railroads propose to add after the word 'change' the words 'in agreements'. I favor this amendment." (Hearings, page 155.)

The representative of the railroads proposing these amendments to Section 2 Seventh and Section 6 was M. W. Clement, the chairman of the committee of the railroads delegated to deal with the proposed amendments to the Railway Labor Act (Hearings, page 55).

With reference to Section 2 Seventh, Mr. Clement proposed the insertion of the words "as a class as embodied in agreements", and other changes in the bill, so that Section 2 Seventh would read as follows:

> " 'No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees as a class as embodied in agreements, except in the manner prescribed in such agreements or in section 6 of this act.' "

He explained these amendments as follows:

> "This is proposed because the working conditions are not defined in the act. They are covered by agreement, and we believe this is a helpful suggestion." (Hearings, page 65.)

With respect to Section 6, Mr. Clement said:

> "Page 29 of the bill, section 6, in line 13, we want to insert the words 'in agreements' after the word 'change'. That is for definiteness and clarity." (Hearings, page 73.)

given. As stated by the Mediation Board in refusing to docket a prior proceeding, involving a part of this line, Section 2 Seventh and Section 6 "apply only in situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements" (R. 70-71). Since Section 6 does not apply to this dispute, it necessarily follows that the *status quo* provision of that section likewise has no application.

Furthermore, even if Section 6 were applicable, the *status quo* provision would not apply to this dispute because "the controversy" was "finally acted upon" by the Mediation Board on November 5, 1958, one day before this lawsuit was filed (R. 2) and forty-three days before the District Court issued its preliminary mandatory injunction against respondents ordering them to restore the *status quo* or pay the affected employees the amounts which they would have received had the operating changes not been made (R. 90-91).

For each and all of the foregoing reasons, the District Court was without power or authority to issue the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, and his action in so doing was contrary to and violative of the intent and purpose of the Railway Labor Act.

Point 5

The action of the District Court in issuing the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, was inequitable and an abuse of his equity powers

Authorities

Rule 65(c) of the Federal Rules of Civil Procedure.

By its order of December 18, 1958,[18] the District Court issued a preliminary mandatory injunction against respondents ordering them to "restore the conditions which were affected by their General Orders 119 and 120", referred to in the complaint, as amended,[19] "to the conditions which existed before such orders became effective" and to "maintain such restored conditions" until the controversy between plaintiffs and defendants is settled by and between the parties or "until decisions on the various submissions by plaintiffs, as set out in the complaint, as amended",[20] including respondents' submission to the National Railroad Adjustment Board, First Division (R. 53, 116-168), or, pending such decisions, to pay the affected employees the amounts of money which they would have received if such operating changes had not been made (R. 91).

[18] R. 91.

[19] R. 47-50.

[20] R. 53-57, 116, 117-118, 169, 170, 174, 176, 177, 181, 183, 184, 190-191, 193, 194-195, 198, 199, 200, 203-204, 205, 206-207, 209-210, 211, 212, 215-216, 217-219, 222, 225, 226-228, 234-238.

As we have heretofore shown, the District Court had no authority under its general equity powers to issue said preliminary mandatory injunction against respondents because said injunction was an unlawful invasion of the exclusive primary jurisdiction of the National Railroad Adjustment Board[21] and because such injunction was contrary to and violative of the intent and purpose of the Railway Labor Act.[22] The injunction was also grossly inequitable.

There are no pleadings or evidence to support such preliminary mandatory injunction and it was not even sought by petitioners. After respondents appealed (R. 92-93), the District Court attempted to convert this injunctive order into a condition upon which the preliminary injunction was issued against petitioners (R. 101-104).

The District Court sought to restore the *status quo* which existed before respondents made the operating changes (R. 60-63), or to require respondents to pay affected employees the amounts which they would have received had such changes not been made, pending decisions by the Adjustment Board, and by other agencies to which submissions had been made subject to jurisdictional objections. This would cost respondents $35,000.00 annually (R. 302) or a total of $140,000.00 should four years elapse before a decision by the Adjustment Board as represented by petitioners (Brief, page 26). Notwithstanding these facts, the preliminary mandatory injunction was issued against

[21]This brief, pages 33-39.
[22]This brief, pages 39-45.

respondents without requiring security from petitioners, and other defendants, despite the express prohibition of Rule 65(c) of the Federal Rules of Civil Procedure that "no * * * preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained". In fact, the District Court refused to require security (R. 300-302).

If respondents are required to make these payments, either through resumption and continuation of the prior service or by arbitrary payments for service not rendered, they will suffer a complete loss to the extent of such payments because the individual employees to whom such payments would be made, and by whom the money would be spent, would not be able to repay such amounts should respondents procure money judgments. On the other hand, the petitioning labor unions cannot be hurt by relieving respondents of this onerous requirement and the employees would not be hurt if they timely file time claims for being deprived of service and the Adjustment Board sustains such claims.

The equities in favor of respondents cannot be offset by the claim of petitioners that money payments would be inadequate because they would not compensate the employees for moving residences, traveling longer distances to and from work, and severance or impairment of family, social, and religious ties (Petitioners' Brief, pages 10, 24,

26). There is no evidence to support this argument.[23] Furthermore, the order of the District Court does not attempt to protect the employees against such consequences. That order expressly provides that if "plaintiffs (respondents) do not elect to restore and maintain the conditions as ordered aforesaid, then until the matters have been finally determined in the boards hereinabove mentioned, the plaintiffs will pay to the employees of the plaintiffs affected adversely by plaintiffs' General Orders 119 and 120 the same amounts of money that they would have paid had the changes made by plaintiffs' General Orders 119 and 120 not been made" (R. 91). This is the order which petitioners are asking this Court to sustain.

ARGUMENT
(Part B)

For the reasons stated in the preliminary statement on page 2, respondents devote the remainder of this argument to petitioners' charges of statutory and agreement violations (Petitioners' Brief, pages 4-6, 7, 22-24, 29, 31).[24]

Point 6

Respondents have not violated any agreement with petitioners or any provision of the Railway Labor Act

Authorities

Awards 12907, 15636, 16032, and 16188 of the First Division of the National Railroad Adjustment Board;

[23] Furthermore, this argument is not supported by any agreement provision.

[24] Also, to the proceedings before the National Mediation Board.

National Committee, Case BLE-12-W;

Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343;

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577;

Southwestern Regional Train Service Board of Adjustment, Case No. 515;

Special Board of Adjustment No. 210, Case No. 21;

Railway Labor Act:

Section 2 Seventh (45 U. S. C. A. Section 152 Seventh);

Section 6 (45 U. S. C. A. Section 156);

Twenty-third Annual Report of the National Mediation Board to Congress (June 30, 1957).

Rearrangement of Service

The lines of railroad involved in this litigation are shown in red on the map, marked "Exhibit 1", attached to and made a part of the affidavit of A. F. Winkel (R. 79). The portion thereof between Wichita Falls, Texas (North Yard), and Forgan, Oklahoma, over which this controversy arose, is emphasized by paralleling green lines. This line, 302 miles in length, is the Western Subdivision of the Southern Division of respondents' lines of railroad (R. 60).

This 302-mile line now constitutes and always has constituted a separate seniority district for said respondents' engineers, firemen, conductors and brakemen, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority.

Prior to October 19, 1958, way freight crews on this line were assigned as follows:

> Two crews between North Yard (Wichita Falls, Texas) and Welon (Altus, Oklahoma), a distance of 75.9 miles, daily except Sunday, with North Yard the home terminal for both crews, and with Sunday layover at North Yard for one crew and at Welon for the other crew;

> One crew from Welon (Altus, Oklahoma) to Elk City, Oklahoma, and return, a distance of 58.3 miles in each direction, daily except Saturday, with Welon the home terminal and with Saturday layover at Welon;
>
> One crew from Elk City, Oklahoma, to Guest (Woodward, Oklahoma), a distance of 84.8 miles, on Mondays, Wednesdays and Fridays, and from Guest to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City; and
>
> One crew from Guest (Woodward, Oklahoma) to Forgan, Oklahoma, a distance of 83.2 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Guest on Tuesdays, Thursdays and Saturdays, with Guest the home terminal and with Sunday layover at Guest.

Such way freight assignments, or similar way freight assignments between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, have been in existence for more than twenty-five years (R. 60-61).

Effective at 12:01 A. M. on October 19, 1958, respondents rearranged assigned way freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

> Assigned two way freight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other; and
>
> Assigned one way freight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles, on Mondays, Wednesdays and Fridays, and

from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City.

This rearrangement of way freight service was made in accordance with General Order No. 119 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 2", is attached to and made a part of the affidavit of A. F. Winkel (R. 62, 80).

Prior to October 19, 1958, North Yard (Wichita Falls, Texas) was the home terminal and Altus, Oklahoma, Woodward, Oklahoma, and Forgan, Oklahoma, were the bulletined away-from-home terminals for unassigned crews in through freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma. Effective at 12:01 A. M. on October 19, 1958, respondents abolished Altus, Oklahoma, and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service, established Elk City, Oklahoma, as an away-from-home terminal for such crews, leaving North Yard (Wichita Falls, Texas) as the home terminal and Forgan, Oklahoma, as an away-from-home terminal for such crews. This change in away-from-home terminals was made in accordance with General Order No. 120 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 3", is attached to and made a part of the affidavit of A. F. Winkel (R. 62, 81).

North Yard (Wichita Falls, Texas) now is and always has been the home terminal for unassigned crews in through freight service between North Yard and Forgan, Oklahoma, and North Yard (Wichita Falls, Texas) now is

and always has been the only point where an extra board has been maintained for way freight crews and unassigned through freight crews operating between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma (R. 62).

Assigned way freight crews now handle, and they always have handled, all of the traffic between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, except, during the grain seasons in May and June of each year, unassigned crews in through freight service are called as needed to handle the overflow wheat which cannot be handled by way freight crews, and, when so called, unassigned through freight crews operate over all or any portion of the line without changing crews except in rare instances where an available crew is used out of an away-from-home terminal under the first-in first-out rule (R. 63).

This line has been recently dieselized. Prior thereto all traffic was handled by steam locomotives which were capable of only short runs, making it necessary to have more terminals. This resulted in considerable terminal delays to through traffic because the requirements of local service made it impossible to arrange through connecting schedules. These delays resulted in the loss of traffic, principally through diversion to trucks. To overcome such losses, it was necessary to expedite the movement of traffic by extending runs and reducing the number of terminals, thereby eliminating all unnecessary terminal delays. This was made possible through the use of diesel power. These were the changes made effective on October 19, 1958 (R. 63).

Agreement Provisions

There is no provision in any agreement between respondents and petitioners, or any of them, which prohibited respondents from rearranging their service, as above described, between Wichita Falls, Texas, and Forgan, Oklahoma. In the absence of such prohibition, respondents had the right to make such changes. This has been made abundantly clear by many awards of the First Division of the National Railroad Adjustment Board. We quote from a few of them:

> Award 15636, Docket 24703 (July 28, 1952)
> First Division, with Referee Edward F. Carter
>
> "It is elemental that the efficient and safe operation of a railroad is the prerogative of management except to the extent that it has been limited by law and the contracts which it has made." (R. 124.) (Award, page 7; Bound Volume 108, page 413.)

> Award 16032, Docket 25436 (January 27, 1953)
> First Division
>
> Engineers-Firemen Supplemental Board with
> Referee Alfred A. Colby
>
> "The Board does not function in a vacuum. We are well aware that enlightened railroad labor organizations recognize the principle that the schedule agreements do not deny to the carrier the right to manage and operate its properties economically and efficiently and that the carrier is also under legal obligation to do so. The carrier's fundamental management rights are restricted only to the extent that they are limited or surrendered in the schedule agreements." (R. 124-125.) (Award, page 19; Bound Volume 112, page 33)

Award 16188, Docket 27267 (March 19, 1953)
First Division

Engineers-Firemen Supplemental Board with Referee Charles Loring

"These claimants base their claims upon the contention that the carrier had no right to cancel established assignments and bulletin new assignments. No contract or rule has been cited to us to sustain such a claim. The carriers have the prerogative to arrange their train assignments to conform to the demands of traffic. Even when an assignment was originally established as the result of a conference the rule is the same; nor is there any rule as to how long new assignments shall remain in effect. There could not well be such a rule if the carriers were to stay in business." (R. 125.) (Award, page 7; Bound Volume 113, page 622)

Award 12907, Docket 21786 (August 2, 1949)
First Division, with Referee John W. Yeager

"In the absence of a prohibitory rule it appears proper for a Carrier in order to meet changed conditions to rearrange runs and make assignments accordingly and to pay for the service on the rearranged basis according to the time and mileage of the run." (R. 125.) (Award, page 6; Bound Volume 86, page 443)

Schedule Agreements

There is no merit in petitioners' claim that respondents violated provisions of their schedule agreements (Petitioners' Brief, pages 6, 22-24).[25]

[25]The power to resolve this issue lies within the exclusive primary jurisdiction of the First Division of the National Railroad Adjustment Board to which it has been submitted by respondents. Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577 (R. 53, 75, 116, 117-118).

In addition to their inherent right, respondents had authority to make such changes under the following provisions of agreements between respondents and petitioners:

Agreement with
The Brotherhood of Locomotive Engineers
(Effective October 1, 1918)

"Article 34"

"The rights to regular engines, also the right and preference to regular runs will be governed by seniority in service on the respective districts to which engineers may be assigned.

"No freight run or yard engine of less than six days per week will be considered for regular assignment and engineers on all such assignments will be paid for all work days not used. *Five days' notice will be given before* road service of this kind is inaugurated or *terminal is changed.* It is understood that fixture switch engineers hold seniority only in yard service." (Our italics) (R. 63-64)

"Article 35"

"Should service be reduced, preference of runs will be governed by seniority on the respective district; when any run is created or vacant on district, the senior engineer on such district will have the right to such run. Should he decline to accept it, or fail to ask for it within ten days, after such vacancy occurs, he will forfeit his right to such run until it again becomes vacant, and it will be open to each engineer who is younger in service in accordance with above provisions.

"*A run will be vacant when terminal is changed to the extent of two miles or more* or when vacated by the engineer holding it, or when the regular time or mileage is changed as much as four hours." (Our italics) (R. 64)

"Article 11"

"Held Away-From-Home Terminal"
(As amended by National Agreement dated August 11, 1948—page 15)

"(a) Engineers in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should an engineer be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal, except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, the *railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics) (R. 64-65)

Agreement with
The Brotherhood of Locomotive Firemen and Enginemen

(Effective October 1, 1918, with revisions to November 1, 1957)

"Article 40"

"(a) When any run is created or vacant on a district, the senior fireman on such District will have

the right to such run. Should he fail to make application or bid for such run within five days after such vacancy is posted, except in the case of sickness or absence, he will forfeit his right to such run until it again becomes vacant, and it will be opened to each fireman who is younger in service in accordance with the above provisions, provided, that when a fireman exercises the privilege of taking a run created or made vacant during his sickness or absence, the run will not otherwise be reopened.

"(b) *A run will be considered vacant when terminal is changed to the extent of two or more miles*, or when vacated by the fireman holding it, or when the time or mileage is changed to the extent of 10 per cent, or when the lay over is changed as much as four hours. This last provision not to apply to yard engines." (Our italics) (R. 65-66)

"Article 11"

"Held Away-From-Home Terminal"

"(a) (National Agreement, August 11, 1948.) Firemen, and helpers on other than steam power, in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should fireman, or helper on other than steam power, be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the

terminal except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, *the railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics) (R. 66).

Agreement with
The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen

(Effective November 1, 1929, with revision to April 1, 1954)

"Article 10"

"Wayfreight and Mixed Train Service"

"Rates of pay effective December 16, 1953"

* * * * *

"(f) No changes will be made in the above runs (between Wichita Falls and Forgan), nor number of crews assigned to them, unless business or changed conditions justify it, nor will terminals be changed, or runs rearranged, without ten (10) days' notice * * *." (R. 67).

"Article 45"

* * * * *

"(e) Seniority will govern the preference of assignment in service, provided that senior trainmen declining closed runs will forfeit their rights to same until vacancies occur, except in reducing the force, the youngest man will be reduced from the service.

* * * * *

"(g) Trainmen holding closed runs who are displaced by their seniors or whose runs have been abolished, will have the right within ten (10) days to displace any junior man.

* * * * *

"(i) The following shall be known as closed runs: *Wayfreight and mixed runs*, assigned work trains, pilots assigned to helper engines, also passenger runs that are located away from division terminals, regular runs on the G. H. & H. and any other runs located away from a district terminal, *and shall be advertised for a period of ten (10) days.*" (Our italics) (R. 67).

* * * * *

Freight Service Rulings

(Appendix to Agreements with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen.)

* * * * *

"(h) When closed runs are thrown open for advertisement due to changed conditions, etc., the regular conductor and brakeman holding such run at that time will be permitted to hold run during advertisement.

"(i) It is agreed that when a terminal is changed for a closed run or a run changed from day to night, such run will be advertised." (R. 68.)

"Article 34"

"Conductors and Trainmen in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at a rate per hour of ⅛th of the daily rate paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held

during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"Should a Conductor or Trainman be called for service or ordered to deadhead after pay begins, held away from home terminal time shall cease at the time pay begins for such service or deadheading.

"Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service for deadheading.

"For the purpose of applying this rule *the railroad will* designate a home terminal for each crew in pool freight and in unassigned service." (Our italics) (R. 68).

The foregoing agreement rules and freight service rulings authorize the abolishment or rearrangement of runs when, in the judgment of management, this is made necessary or desirable for business reasons, or because of changed conditions, and such rules and rulings authorize changes in terminals deemed necessary or desirable by management as a result of the abolishment or rearrangement of such runs.

Petitioners now assert that respondents violated Article 10 (a) and (f) and Article 59 of their schedule agreement with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen (Petitioners' Brief, pages 6, 22-24). No contention is now made, as in petitioners' answer, that respondents violated all of Article 10 and Articles 11 and 60 of that schedule agreement (R. 37-38). Petitioners, therefore, have waived their claimed violation of Article 10 (b), (c), (d), (e), and (g), and

Articles 11 and 60 of said schedule agreement. There has been no violation of Article 10 (a) which merely prescribes the *rates* of pay of conductors and brakemen. There has been no violation of Article 10 (f) because "business or changed conditions" justified the changes in the runs (R. 62-63) and respondents gave the required 10 days' notice of terminal changes and rearrangement of runs (R. 60-63, 80-81). There has been no violation of Article 59 because respondents have not made any "ruling" with respect to Article 10.

Petitioners' arguments with respect to Article 10(a) and (f) have been decided adversely to them by Boards of Adjustment.

Case No. 515, involving respondents, The Order of Railway Conductors, and The Brotherhood of Railroad Trainmen, was decided on February 20, 1931, by the Southwestern Regional Train Service Board of Adjustment. In that case, a conductor and two brakemen sought pay for one day lost in changing the way freight run between Smithville and Granger, Texas, from daily to alternate day service, except Sunday, and in changing the home terminal for such crew from Smithville to Granger. The claim was based upon Article 15(a) but the Brotherhood and Order stated that "the tabulation of Article 10 in the Trainmen's Agreement provides for regular local service with one crew and three brakemen between Smithville and Granger". On the other hand, the Carriers, quoting Article 10(f), contended that the tabulation in Article 10(a) was "no guarantee of service" and that "abolishment of runs and changes in

service was contemplated and is provided for as shown in paragraph (f) of Article 10". The Board denied the claim after finding that "the handling in this case was in accordance with rule and practice". A copy of the Board's decision, No. 382, is attached as Appendix F to this brief.

Case No. 21, involving respondents and The Brotherhood of Railroad Trainmen, was decided on February 13, 1959, by Special Board of Adjustment No. 210. That Board was composed of three men, including E. B. Boggs, a Vice President of The Brotherhood of Railroad Trainmen. The case involved the abolishment of way freight service between Franklin, Missouri, and Parsons, Kansas. The Brotherhood of Railroad Trainmen made substantially the same arguments which petitioners are making in this case. In denying the Brotherhood's claim that the Carriers had cancelled agreements, the Board, in a unanimous decision, said in part:

> "Management has the prerogative to determine the service to be rendered to the public except in cases where the same is limited by statutory law and the granting of rights to limit such prerogative by provisions in collective bargaining agreements. To limit such rights there must be explicit wording in agreement provisions to do so. In the absence of such precise and explicit wording this limitation cannot be implied or inferred in articles of the agreement. We find no such limitation in the rules of this agreement."

A copy of the Board's award, No. 21, is attached as Appendix G to this brief.

Mediation Agreements

Petitioners assert that respondents violated mediation agreements with petitioners (Petitioners' Brief, pages 7, 22-24).[26] The agreements to which petitioners refer are the provisions of Article VIII (b) of Mediation Agreement Case No. A-5241, dated November 20, 1956, with The Brotherhood of Locomotive Firemen and Enginemen, the provisions of Article VIII (b) of Mediation Agreement Case No. A-5248 dated April 5, 1957, with The Brotherhood of Railroad Trainmen, the provisions of Article V (b) of Mediation Agreement Case No. A-5294 dated June 12, 1957, with

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[26]Respondents have submitted this issue to the First Division of the National Railroad Adjustment Board (R. 53, 75, 116, 117-118), and, subject to jurisdictional objections, to the Disputes Committees created by the respective Mediation Agreements (R. 55-57, 76-77, 193-195, 198, 199-200, 203-204, 205-207, 209-210, 211-212, 215-216), and, subject to jurisdictional objections, to the National Mediation Board (R. 44-45, 77, 217-219, 222-225).

Decisions of three of the Disputes Committees are described in footnote 4 (e), (f) and (g) on pages 9-10 of this brief and copies of these decisions are Appendices A, B and C to this brief.

The National Mediation Board declined to interpret these Mediation Agreements "on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned" (Appendix D to this brief).

The policy of the National Mediation Board with respect to its interpretation of mediation agreements, is thus stated on page 42 of its Twenty-third Annual Report to Congress for the year ending June 30, 1957:

> "Under section 5, second, of the Railway Labor Act, the National Mediation Board has the duty of interpreting the specific terms of mediation agreements. Requests for such interpretations may be made by either party to mediation agreements, or by both parties jointly. The law provides that interpretations must be made by the Board within 30 days following a hearing, at which both parties may be present and defend their respective positions.
>
> "In making such interpretations, the National Mediation Board can consider only the meaning of the specific terms of the mediation agreement. The Board does not and cannot attempt to interpret the application of the terms of a mediation agreement to particular situations" (R. 283-284).

The Order of Railway Conductors and Brakemen, and the provisions of Article VIII (b) of Mediation Agreement Case No. A-5464 dated July 18, 1957, with The Brotherhood of Locomotive Engineers. Copies of those articles are attached as Exhibits 16, 17, 18 and 19, respectively, to respondents' submission to the National Railroad Adjustment Board. (R. 160-168). The relevant provisions of those articles are substantially the same. They prohibit a carrier from serving any notice or progressing any pending notice (1) to decrease the rate of compensation provided in existing agreements or understandings, or (2) to eliminate agreements providing for any rate of compensation, or (3) to negotiate agreements which would have the effect of decreasing the number of employees required to be used under existing agreements. Respondents have not done any of these things and therefore the provisions of those articles have not been violated.

National Agreements

There is no merit in petitioners' contentions that respondents have violated the provisions of Article 4 of a National Agreement dated May 23, 1952, between The Brotherhood of Locomotive Engineers and representatives of numerous railroad companies, including respondents, and that respondents have violated the provisions of Article 4 of a National Agreement dated May 23, 1952, between The Brotherhood of Locomotive Firemen and Enginemen

and representatives of numerous railroad companies, including respondents (Petitioners' Brief, pages 4-6, 22-24).[27]

Petitioners have now receded from their position before the National Mediation Board in October, 1958, that respondents also violated similar agreements with The Order of Railway Conductors and Brakemen (formerly The Order of Railway Conductors) and The Brotherhood of Railroad Trainmen (R. 69), and petitioners have now receded from the allegation in their answer that respondents violated a similar agreement with The Order of Railway Conductors and Brakemen (R. 39). Petitioners therefore have waived their previous claims of such additional violations.[28]

[27]Respondents have submitted this issue to the First Division of the National Railroad Adjustment Board (R. 53, 75, 116, 117-118), and, subject to jurisdictional objections, to the National Committees created by the respective agreements (R. 53-55, 75-76, 169, 170, 174, 176, 177, 181), and, subject to jurisdictional objections, to the National Mediation Board (R. 45, 77-78, 226-228, 234-238).

The National Mediation Board has declined to interpret those provisions of the agreements "on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned" (Appendix E to this brief).

It is doubtful that either of these agreements is an "agreement reached through mediation" within the meaning of Section 5 Second of the Railway Labor Act (45 U. S. C. A., Sec. 155 Second) but, if so, the policy of the National Mediation Board with respect to its interpretation of such agreements, as set forth on page 42 of its Twenty-third Annual Report to Congress for the year ending June 30, 1957, is in the record (R. 283-284) and is reproduced in the preceding footnote.

[28]Petitioners admitted that there never was such an agreement between respondents and The Brotherhood of Railroad Trainmen (R. 19, 38).

The provisions of Article 6 (instead of Article 4) of the National Agreement dated May 23, 1952, between The Order of Railway Conductors (now The Order of Railway Conductors and Brakemen) and representatives of numerous railroad companies, including respondents, became an agreement on August 1, 1952, between said Order and respondents but said agreement was cancelled in the year 1954 when said Order and respondents agreed upon a reprint of their agreements and agreed (1) not to reproduce the provisions of Article 6 of said National Agreement of May 23, 1952, (2) that said provisions were rejected, and (3) that existing rules or practices were preserved (R. 19-20, 73, 82-90).

Respondents also submitted petitioners' claim that respondents violated the provisions of Article 6 of said agreement of May 23, 1952, to the First Division of the National Railroad Adjustment Board (R. 53, 75, 116, 117-118), and, subject to jurisdictional objections, to the National Committee created by said agreement (R. 55, 76, 183, 184, 190-191), and, subject to jurisdictional objections, to the National Mediation Board (R. 45, 77-78, 226-228, 234-238).

A copy of Article 4 of the agreement of May 23, 1952, with The Brotherhood of Locomotive Engineers and a copy of Article 4 of the agreement of May 23, 1952, with The Brotherhood of Locomotive Firemen and Enginemen are attached as Exhibits 10 and 11, respectively, to respondents' submission to the First Division of the National Railroad Adjustment Board (R. 149-150, 151-152). Those articles are identical. The title of each refers, among other things, to intradivisional "service", and the pertinent provisions are:

> "*Where a carrier desires to establish* interdivisional, interseniority district, *intradivisional*, or intraseniority district *runs in* passenger or *freight service*, the carrier shall give notice to the General Chairman of the organizations involved of its desire *to establish* such runs, giving detailed information *specifying the service it proposes to establish* and the conditions, if any, which it proposes shall govern *the establishment of such service*, the purpose being to furnish the employees with all the necessary information.
>
> "The parties will negotiate in good faith on *such proposals* and failing to agree, either party may invoke the services of the National Mediation Board. If mediation fails and the parties do not agree to arbitrate the dispute under the Railway Labor Act, then at the request of either party, the proposal will be considered by a National Committee consisting of the chiefs of the employee organizations involved and an equal number of carrier representatives who shall be members of the Carriers' Conference Committees, signatories hereto, or their successors or repesentatives * * *.
>
> "If said National Committee does not agree upon the disposition of *the proposal*, then the conferees will in good faith undertake to agree upon a neutral chairman who will sit with the Committee, hear the arguments

of the parties, and make representations and recommendations to the parties with the view in mind of disposing of the controversy. In the event the parties do not agree upon such neutral chairman, then upon the request of the parties, or either of them, the National Mediation Board will appoint the chairman.

"While the recommendations of the Chairman are not to be compulsory or binding as an arbitration award, yet the parties hereto affirm their good intentions of arranging through the above procedures for the final disposition of all such disputes on a fair and reasonable basis" (Our italics) (R. 149-152).

These agreements, effective August 1, 1952, relate to intradivisional *service* which "a carrier desires to *establish*"—not, as here, to a change or rearrangement of such service which has been in existence for more than 25 years (R. 61).[29]

Furthermore, these agreements do not relate to intradivisional service established under other agreements either before or after August 1, 1952, the effective date of Articles 4, or to intradivisional service which could have been established under other agreements either before or after

[29]These national agreements also are not applicable because:

(1) This 302 miles of line between Wichita Falls, Texas, and Forgan, Oklahoma, now is and always has been a separate seniority district for engineers, firemen, conductors and brakemen with the extra board maintained at Wichita Falls, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority; and

(2) Respondents have and have had the right, under other working agreements in effect on August 1, 1952, and now in effect, to establish, abolish, and change any terminal on said line and to establish, lengthen, shorten, abolish, and change, any run or runs on said line, and such agreements and rights were not affected by said national agreements.

that date. This has been made clear by decisions of the National Committees (commonly called "Disputes Committees") created by said agreements of May 23, 1952, three of which are attached as Exhibits 12, 13 and 14 to respondents' submission to the National Railroad Adjustment Board (R. 153-158).

In "Case BLE-12-W" (R. 157-158), involving The Brotherhood of Locomotive Engineers, the Disputes Committee[30] said:

> "If prior to the May 23, 1952 Agreement road switchers could be assigned by bulletin to operate into and out of Los Angeles under existing schedule rules, agreements or practices, the answer to the 'Question at Issue'[31] is 'No'. If not, Article 4 is controlling."

Only the National Railroad Adjustment Board could determine, in the first instance, whether the Santa Fe violated its schedule agreement with The Brotherhood of Locomotive Engineers in making such assignment. *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.*

No importance should be attached to petitioners' assertions that respondents *established* intradivisional *runs* in violation of national agreements (Petitioners' Brief, pages

[30]Composed of three carrier members and R. E. Davidson, First Assistant Grand Chief Engineer of The Brotherhood of Locomotive Engineers; S. C. Phillips, Assistant President of The Brotherhood of Locomotive Firemen and Enginemen; and J. A. Paddock, President of The Order of Railway Conductors and Brakemen.

[31]Whether The Atchison, Topeka and Santa Fe Railway Company violated Article 4 of the May 23, 1952, agreement with The Brotherhood of Locomotive Engineers "when it changed the on and off duty point of certain road switcher assignments from Los Angeles, California, to Rivera, California".

4-6, 22-24). They are well aware that only a *change* in *existing service* was made. In requesting the services of the National Mediation Board in October, 1958, petitioners then declared that respondents were violating these national agreements by "*changing* intradivisional *service*". The Board accepted this statement and, after investigation by one of its mediators, held that "the dispute is not one subject to docketing and mediation under the Act" (R. 69).[32]

Alleged Statutory Violations

Status Quo

There is no merit in petitioners' contention that respondents violated Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 156) in not maintaining the *status quo* while this controversy was pending before the National Mediation Board in October, 1958 (Petitioners' Brief, pages 7, 31).

Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 156) reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such

[32]Petitioners also claim that respondents violated these national agreements by "abolishing established terminals" (Petitioners' Brief, pages 4, 22) (R. 69). Clearly there is no substance to this contention because these national agreements do not apply to terminals.

> notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 6 has no application to this case because, as stated by the National Mediation Board in a prior proceeding, involving a part of this line, Section 6 applies "only in situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements" (R. 70-71); or, in the language of that section, "written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions". (Our italics). This is not such a case.

Furthermore, the National Mediation Board did not request respondents, before the changes were made, to maintain the status quo.[33] The changes were made on October 19, 1958 (R. 62). On October 20, 1958, the Executive Secretary of the National Mediation Board advised respondents that a mediator would commence an investigation on October 21, 1958, and that the Board "suggests carrier defer contemplated changes pending such immediate investigation" (R. 69). The Board never requested respondents to restore the status quo.

[33] As the Board did on two previous occasions when its requests were observed by respondents (R. 70).

Section 2 Seventh and Section 6 of the Railway Labor Act

There is no merit in petitioners' contention that respondents changed rates of pay, rules, or working conditions in violation of Section 2 Seventh and Section 6 of the Railway Labor Act (Petitioners' Brief, pages 29, 31).

Section 2 Seventh of the Railway Labor Act (45 U. S. C. A. Section 152 Seventh) reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Railway Labor Act (45 U. S. C. A. Section 156) has been quoted in the preceding section of this brief.

There has been no violation of either section because, as stated by the National Mediation Board in a prior proceeding involving a part of this line:

> "Section 2 Seventh and Section 6 of RLA (Railway Labor Act) apply only in situations where notices of changes are served by either party on the other in rates, rules of working conditions as covered by agreements" (R. 70-71);

or, as stated in the language of Section 6, "written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions" (our italics); because respondents have not served any such notice; and because respondents have not made any change in any agreement affecting rates of pay, rules, or working conditions.

Initiation of Section 6 Notice

There is no merit in petitioners' contention, implicit throughout their brief, that respondents should have initiated a Section 6 notice. There was no reason why they should do so. Furthermore, in a strikingly similar case, *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34*,[34] it was held that this burden was upon the organizations. The Court of Appeals said:

> "* * * In their answer in this case, the Brotherhoods alleged that the change to Berkley Yard as the point for reporting and relief of some of the crews 'does constitute a change in working conditions within the meaning of Section 2, Article 7, of the Railway Labor Act requiring the complainant to give the defendants notice of such change pursuant to Section 6 of the Railway Labor Act, and requiring negotiations by complainant and defendants to establish working conditions applicable to such change'." (Page 43.)
>
> * * * * *
>
> "* * * The Brotherhoods did not comply with Section 6." (Page 45.)
>
> * * * * *
>
> "* * * The concession of the Brotherhoods to the legal position of the carrier upon the 'minor issue' may have made moot the pending proceeding before the Adjustment Board, but it cannot leave them free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a 'major dispute' under the required procedures of the Act." (Page 46.)

As in the *Norfolk* case, petitioners have not initiated a Section 6 notice in the instant case.

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[34]Certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.

Point 7

The District Court issued a preliminary mandatory injunction against respondents which, after appeal, could not be converted into a condition upon which a preliminary injunction was issued against petitioners

Authorities

Hunter Douglas Corporation v. Lando Products, 235 F. 2d 631;

Secretary of Banking of Pennsylvania v. Alker, 183 F. 2d 429.

The District Court issued a preliminary injunction on December 18, 1958, reading in part as follows:

> "It Is, Therefore, Ordered that this cause be continued and held in abeyance until the controversy between plaintiffs and defendants herein shall have been settled by and between the parties, or until decisions on the various submissions made by plaintiffs, as set out in the complaint, as amended,[35] have been rendered, and that during such period plaintiffs restore the conditions which were affected by their General Orders 119 and 120, referred to in the complaint, as amended,[36] to the conditions which existed before such orders became effective, and maintain such restored conditions during such period. In the alternative if the plaintiffs do not elect to restore and maintain the conditions as ordered aforesaid, then until the matters have been finally determined in the boards

[35]R. 53-57, 116, 117-118, 169, 170, 174, 176, 177, 181, 183, 184, 190-191, 193, 194-195, 198, 199, 200, 203-204, 205, 206-207, 209-210, 211, 212, 215-216, 217-219, 222, 225, 226-228, 234-238.

[36]R. 47-50.

hereinabove mentioned, the plaintiffs will pay to the employees of the plaintiffs affected adversely by plaintiffs' General Orders 119 and 120 the same amounts of money that they would have paid had the changes made by plaintiffs' General Orders 119 and 120 not been made.

"* * * It is further ordered that the defendants and employees of plaintiffs represented by defendants be and they are hereby enjoined from striking during such period on account of the controversy and dispute involved herein between plaintiffs and defendants." (R. 91.)

On December 29, 1958, respondents appealed from the preliminary mandatory injunction against them (R. 92-93).

In denying respondents' motion for a stay order on January 13, 1959, the District Court attempted to explain, alter, modify, amend, limit, or condition, the preliminary injunction against petitioners and to make the preliminary mandatory injunction against respondents a condition upon which the preliminary injunction was issued against petitioners (R. 101-104). This could not be accomplished in such collateral fashion and such action was precluded by respondents' appeal from the preliminary mandatory injunction which transferred jurisdiction of the subject matter from the District Court to the Court of Appeals. The District Court "was therefore without authority to act in matters relating to the subject matter until the mandate was returned". *Hunter Douglas Corporation v. Lando Products, 235 F. 2d 631, 632-633.* See also, *Secretary of Banking of Pennsylvania v. Alker, 183 F. 2d 429, 431.*

POINT 8

The District Court had no power or authority to issue the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, because there were no pleadings or evidence to support such injunction or condition.

Authorities

43 C. J. S., Injunctions, Section 182.

The District Court had no authority to issue the preliminary mandatory injunction against respondents because there are no pleadings or evidence to support it. "For relief by injunction the applicant's case must be presented by a bill of complaint or by a cross bill", or an affidavit which "contains all the ingredients of a bill of complaint", and "all the facts necessary to entitle complainant to an injunction must be set forth", *43 C. J. S., Injunctions, Section 182.* Furthermore, an injunction was not even sought by petitioners.

Likewise, there are no pleadings or evidence to support any condition which might have been imposed upon the preliminary injunction against petitioners.

POINT 9

The District Court had no power or authority to issue the preliminary mandatory injunction against respondents or, in the alternative, the condition upon which the preliminary injunction was issued against petitioners, because no security was required as provided in Rule 65(c) of the Federal Rules of Civil Procedure.

Authorities

Rule 65(c) of the Federal Rules of Civil Procedure.

The District Court had no authority to issue the preliminary mandatory injunction against respondents because no security was required of petitioners and the other defendants as required by Rule 65(c) of the Federal Rules of Civil Procedure, reading in part as follows:

> "No * * * preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

In fact, the District Court refused to require security (R. 300-302).

Point 10

The District Court unlawfully destroyed the status quo existing when the preliminary injunction was issued against petitioners and the District Court unlawfully restored and preserved the status quo which existed before respondents made the operating changes and before the strike which made this litigation necessary

Authorities

Benson Hotel Corporation v. Woods, 168 F. 2d 694;

Hunter v. Atchison, T. & S. F. Ry. Co., 188 F. 2d 294.

By order dated December 18, 1958, the District Court issued a preliminary mandatory injunction against respondents commanding them, pending decisions of the National Railroad Adjustment Board, the National Mediation Board, and established Committees, either to restore operations which had been changed on October 19, 1958, or to pay to affected employees the same amount of money which they would have received had such changes not been made (R. 90-92, 60-63). In so doing, the District Court unlawfully destroyed the status quo existing on December 18, 1958, when that Court granted respondents' application for a preliminary injunction against petitioners (R. 90-92), and the District Court unlawfully restored and preserved the status quo which existed before respondents made said operating changes on October 19, 1958, and be-

fore the strike on November 6, 1958, which made this litigation necessary (R. 58-60). The object of a preliminary injunction "is to preserve the subject of the controversy in its *then* existing conditions" (our italics), *Hunter v. Atchison, T. & S. F. Ry. Co., 188 F. 2d 294, 298;* or, as otherwise stated, "to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing", *Benson Hotel Corporation v. Woods, 168 F. 2d 694, 696.*

Point 11

The District Court unlawfully adjudicated the merits of this controversy upon respondents' application for a preliminary injunction

Authorities

Hunter v. Atchison, T. & S. F. Ry. Co., 188 F. 2d 294.

The District Court, by order dated December 18, 1958, issued a preliminary mandatory injunction against respondents commanding them, pending decisions of the National Railroad Adjustment Board, the National Mediation Board, and established Committees, either to restore operations which had been changed on October 19, 1958, or to pay

to affected employees the same amount of money which they would have received had such changes not been made (R. 90-91). This was a prohibited adjudication of the merits of this case on respondents' application for a preliminary injunction, *Hunter v. Atchison, T. & S. F. Ry. Co., 188 F. 2d 294, 299.*

CONCLUSION

If the preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners is restored, a disastrous pattern will be set for the railroad industry. Every time a railroad company makes an operating change, even though authorized by or not prohibited by its labor agreements, a labor union will claim an agreement violation and threaten to strike. In order to prevent a strike, the railroad company will seek an injunction and submit the union's claim to the National Railroad Adjustment Board. While the claim is pending before such Board, the Court will compel the railroad company either to restore the operating condition or pay the affected employees the sums of money which they would have received had such operating change not been made. The end result is that no operating change, even though authorized by or not prohibited by an agreement, can be made without prior approval of such Board. This was never intended by, and is a perversion of, the Railway Labor Act.

We respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated April 14, 1960.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing brief upon counsel for petitioners and the Railway Labor Executives' Association as *amicus curiae*, by depositing such copies in the United States mail, first-class postage prepaid, and addressed to them as follows: Mr. J. Hart Willis, 1408 Tower Petroleum Building, Dallas 1, Texas; Mr. Harold C. Heiss, 622 Keith Building, Cleveland 15, Ohio; Mr. Clarence E. Weisell, 1706 Union Commerce Building, Cleveland 14, Ohio; Mr. V. C. Shuttleworth, 1120 Merchants National Bank Building, Cedar Rapids, Iowa; Mr. William P. Fonville, 2232 Republic National Bank Building, Dallas 1, Texas; Mr. Hart Willis, Jr., 1408 Tower Petroleum Building, Dallas 1, Texas; Mr. Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio; Mr. Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C.; and Mr. James L. Highsaw, Jr., 620 Tower Building, Washington 5, D. C.

I also hereby certify that said copies were forwarded by air mail on this date to all of said counsel for petitioners and the Railway Labor Executives' Association in Cleveland, Ohio, Cedar Rapids, Iowa, Toledo, Ohio, and Washington, D. C.

Dated April 14, 1960.

/s/ M. E. CLINTON

Of Counsel for Respondents

APPENDIX A

Case BLF&E-7-W

Decision
of the
Disputes Committee Created by Article X of the
November 20, 1956 Agreement to Handle Disputes
Under Such Agreement
between
Employees Represented by The Brotherhood of
Locomotive Firemen and Enginemen
and certain
Eastern, Western and Southeastern Railroads

• • • • •

Chicago, Illinois—September 22, 1959

PARTIES TO DISPUTE:

Missouri-Kansas-Texas Railroad Company and
Missouri-Kansas-Texas Railroad Company of Texas
and
Brotherhood of Locomotive Firemen and Enginemen.

QUESTION AT ISSUE:

The Brotherhood of Locomotive Firemen and Enginemen claims that Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas violated the provisions of Article VIII (b) of said Mediation Agreement No. A-5241 when they, by their General Order No. 119 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, rearranged assigned way freight serv-

ice between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

(a) Cancelled existing way freight assignments;

(b) Assigned two wayfreight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other;

(c) Assigned one wayfreight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles, on Mondays, Wednesdays, and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City;

and when they, by their General Order No. 120 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, abolished Altus, Oklahoma and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service and in lieu thereof established Elk City, Oklahoma, and Forgan, Oklahoma, as away-from-home terminals for such crews, leaving Wichita Falls as the home terminal for such crews. Said Railroad Companies deny any violation.

DECISION:

The issue involved in this dispute has been submitted to the Committee created by Article 11 of the Agreements of May 23, 1952. In view of these circumstances the case is dismissed.

EMPLOYEE MEMBERS	CARRIER MEMBERS
M. W. HAMPTON	FRANK J. GOEBEL
W. B. WOODWARD, JR.	J. E. WOLFE
DALE H. CREASY	B. B. BRYANT

APPENDIX B

Case BRT-20-W

Decision
of the
Committee Created by Article X of the April 5, 1957
Agreement to Handle Disputes Under Such Agreement
between
Employees Represented by The Brotherhood of
Railroad Trainmen
and certain
Eastern, Western and Southeastern Railroads

* * * * *

Chicago, Illinois—September 22, 1959

PARTIES TO DISPUTE:

Missouri-Kansas-Texas Lines
and
Brotherhood of Railroad Trainmen.

QUESTION AT ISSUE:

The Brotherhood of Railroad Trainmen claims that Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas violated the provisions of Article VIII (b) of said Mediation Agreement No. A-5248 when they, by their General Order No. 119 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, rearranged assigned way freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

(a) Cancelled existing way freight assignments;

(b) Assigned two wayfreight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other;

(c) Assigned one wayfreight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles on Mondays, Wednesdays, and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City;

and when they, by their General Order No. 120 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, abolished Altus, Oklahoma and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service and in lieu thereof established Elk City, Oklahoma, and Forgan, Oklahoma, as away-from-home terminals for such crews, leaving Wichita Falls as the home terminal for such crews. Said Railroad Companies deny any violation.

• • • • •

DECISION:

The record is clear that this Committee is without jurisdiction to handle this dispute. Case dismissed.

EMPLOYEE MEMBERS	CARRIER MEMBERS
FRANK J. GOEBEL	V. W. SATTERWHITE
J. E. WOLFE	V. L. ROBERTS
F. K. DAY, JR.	H. W. STOUGH

APPENDIX C

Case ORC&B-1-W

Decision
of the
Committee Created by Article VII of the June 12, 1957
Agreement to Handle Disputes Under Such Agreement
between
Employees Represented by The Order of Railway
Conductors and Brakemen
and certain
Eastern, Western and Southeastern Railroads

* * * * *

Chicago, Illinois—August 4, 1959

PARTIES TO DISPUTE:

Missouri-Kansas-Texas Lines
and
Order of Railway Conductors and Brakemen.

QUESTION AT ISSUE:

The Order of Railway Conductors and Brakemen claims that Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas violated the provisions of Article V (b) of said Mediation Agreement No. A-5294 when they, by their General Order No. 119 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, rearranged assigned way freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

(a) Cancelled existing way freight assignments;

(b) Assigned two wayfreight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other;

(c) Assigned one wayfreight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles on Mondays, Wednesdays, and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City;

and when they, by their General Order No. 120 dated October 2, 1958, and effective at 12:01 A. M. on October 19, 1958, abolished Altus, Oklahoma and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service and in lieu thereof established Elk City, Oklahoma, and Forgan, Oklahoma, as away-from-home terminals for such crews, leaving Wichita Falls as the home terminal for such crews. Said Railroad Companies deny any violation.

* * * * *

DECISION:

The record is clear that this Committee is without jurisdiction to handle this dispute. Case dismissed.

EMPLOYEE MEMBERS	CARRIER MEMBERS
FRANK J. GOEBEL	L. J. WAGNER
J. E. WOLFE	G. H. HARRIS
B. B. BRYANT	C. F. CHRISTENSEN

APPENDIX D

NATIONAL MEDIATION BOARD
Washington

January 30, 1959

Mr. A. F. Winkel, Assistant General Manager
Missouri-Kansas-Texas Railroad Company
Dallas 2, Texas

Dear Mr. Winkel:

Further reference is made to your letter of December 16, 1958, transmitting five copies of application by the Missouri-Kansas-Texas Railroad Company and the Missouri-Kansas-Texas Railroad Company of Texas, subject to jurisdictional questions, for an interpretation of the meaning or application of Article VIII(b) of Mediation Case No. A-5241 between the Eastern, Western and Southeastern Carriers' Conference Committees and the Brotherhood of Locomotive Firemen & Enginemen, of Article VIII(b) of Mediation Case No. A-5248 between the Conference Committees and the Brotherhood of Locomotive Engineers and Article V(b) of Mediation Agreement Case No. A-5294 between the Conference Committees and the Order of Railway Conductors & Brakemen as applied to the facts set forth in the application.

Your application was considered by the Board in executive session on January 26, 1959. In view of the fact that the carriers named have submitted this dispute both to the

First Division of the National Railroad Adjustment Board and the Disputes Committees created by the articles of the national agreements mentioned above, the Board directed that your application for an interpretation of the national agreements in question be declined on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

APPENDIX E

NATIONAL MEDIATION BOARD
Washington

January 30, 1959

Mr. A. F. Winkel, Assistant General Manager
Missouri-Kansas-Texas Railroad Company
Dallas 2, Texas

Dear Mr. Winkel:

Further reference is made to your letter of December 16, 1958, attaching five copies of application by the Missouri-Kansas-Texas Railroad Company and the Missouri-Kansas-Texas Railroad Company of Texas, subject to jurisdictional questions, for an interpretation of the meaning or application of Article IV of the National Agreement dated May 23, 1952, between the Eastern, Western and Southeastern Carriers' Conference Committees and the Brotherhood of Locomotive Firemen & Enginemen, Article IV of the National Agreement of May 23, 1952, between the Conference Committees and the Brotherhood of Locomotive Engineers, and Article VI of the National Agreement dated May 23, 1952, between the Conference Committees and the Order of Railway Conductors & Brakemen, assuming that the latter agreement is in existence which is denied, as applied to the facts set forth in the application.

Your application was considered by the Board in executive session on January 26, 1959. In view of the fact that the carriers named have submitted this dispute both to the First Division of the National Railroad Adjustment Board and the Disputes Committees created by the articles of the national agreements mentioned above, the Board directed that your application for an interpretation of the national agreements in question be declined on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

APPENDIX F

Decision No. 382
Case No. 515

SOUTHWESTERN REGIONAL TRAIN SERVICE BOARD OF ADJUSTMENT

ORDER OF RAILWAY CONDUCTORS BROTHERHOOD OF RAILROAD TRAINMEN

versus

MISSOURI-KANSAS-TEXAS LINES

Claim of Conductor C. E. Mortimer and Brakemen C. Henry and C. Carter, January 27, 1930, account of not being used in local service.

POSITION OF COMMITTEE: Prior to January 26th this crew was assigned to the Smithville-Granger local with Sunday layover at Smithville. On January 17th the Management put out a bulletin reading as follows:

> "All Train and Enginemen: Effective January 26th the Smithville-Granger local is abolished. Effective January 28th local service will be established between Smithville and Granger, operating alternate daily except Sunday with Sunday layover at Granger. This local will work out of Smithville Tuesday, January 28th. Bids will be received for a conductor and three brakemen to fill this local until midnight January 27th. Mail bids to Chief Caller D. B. Maney, Smithville, Texas."

This crew worked into Smithville on January 25th, January 26th being Sunday and January 27th Monday, the day that the crew lay in Smithville and did not work. Hence

their claim for one day account of not being used January 27th.

The tabulation of Article 10 in the Trainmen's Agreement provides for regular local service with one crew and three brakemen between Smithville and Granger. Article 15, Paragraph (a), reads:

> "Regularly assigned way freight, wreck, work and construction trainmen who are ready for service the entire month and who do not lay off of their own accord, will be guaranteed not less than one hundred (100) miles, or eight (8) hours, for each calendar working day, exclusive of overtime (this to include legal holidays). If through act of Providence it is not possible to perform regular service, guarantee herein does not apply. This will apply to home terminals only."

The Committee contends that the Management has no right under the above quoted rule to abolish local service in this territory. Therefore, the crew that was regularly assigned to the service and who bid in the new service should be entitled to the day lost account of the change being made, as was done in this case.

POSITION OF MANAGEMENT: The tabulation to which reference is made in employees' submission only provides for the crews embraced in given territory to consist of three brakemen; in other words, to define three-brakemen territory as distinguished from other territory on which less than three brakemen are used on way freight runs. There is no guarantee of service, in fact, abolishment of runs and changes in service was contemplated and is

provided for as shown in Paragraph (f) of Article 10, quoted below:

> "No changes will be made in the above runs, nor number of crews assigned to them, unless business or changed conditions justify it, nor will terminals be changed, or runs rearranged, without ten (10) days' notice."

The handling in this case was in accordance with rule and practice and claim should therefore be declined.

DECISION: Claim denied.

S. A. BOONE,
Chairman.

St. Louis, Missouri, February 20, 1931.

APPENDIX G

Award No. 21
Case No. 21

SPECIAL BOARD OF ADJUSTMENT NO. 210

PARTIES TO DISPUTE
BROTHERHOOD OF RAILROAD TRAINMEN
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD
COMPANY OF TEXAS

STATEMENT OF CLAIM:

Claim regarding way freight service and crews between Franklin and Parsons relative to being abolished and agreements cancelled.

FINDING:

We are of the opinion that rules cited by Claimants and Petitioner do not have the far-reaching effect as claimed herein.

Also the historical background on the proposition on this property does not have the import as claimed by Petitioner.

Management has the prerogative to determine the service to be rendered to the public except in cases where the same is limited by statutory law and the granting of rights to limit such prerogative by provisions in collective bargaining agreements. To limit such rights there must be explicit wording in agreement provisions to do so. In the absence of such precise and explicit wording this limitation

cannot be implied or inferred in articles of the agreement. We find no such limitation in the rules of this agreement.

AWARD:

Claim denied.

/s/ Le Roy A. Rader

LE ROY A. RADER, Chairman

/s/ A. F. Winkel

A. F. WINKEL, Carrier Member

/s/ E. B. Boggs

E. B. BOGGS, B. of R. T. Member

Signed and dated this 13th day of February A. D. 1959 in Dallas, Texas.

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